Westchester County Round-Up:
Recent Significant Decisions from the
Westchester Federal and State Courts
January 2017

This article continues Yankwitt LLP's quarterly review of decisions from the Federal District Court and State Supreme Court in White Plains, New York. This article reviews decisions from the fourth quarter of 2016.

Judge Seibel Dismisses Complaint Alleging Consumer Deception

In *Bautista v. Cytosport, Inc.*, No. 15-CV-9081 (CS), 2016 WL 7192109 (S.D.N.Y. Dec. 12, 2016), **Judge Cathy Seibel** granted Defendant's motion to dismiss Plaintiff's second amended complaint alleging violations of New York's Deceptive Trade Practices Act ("DTPA"), fraud, negligent misrepresentation, and unjust enrichment. Plaintiff sued on behalf of himself and a nationwide class of similarly situated consumers, after his container of Defendant's Muscle Milk protein powder was allegedly ~30% empty. The Food, Drug, and Cosmetic Act prohibits manufacturers from utilizing opaque containers containing "non-functional slack fill" (*i.e.*, the difference between the actual capacity of the container and the volume of the product contained therein) unless they fall into a safe-harbor for various utilitarian purposes. That safe-harbor, in turn, is *de jure* incorporated into New York law. As a preliminary matter, Judge Seibel found Plaintiff had standing to sue on behalf of a putative class because the product he purchased was sufficiently similar to related products he alleged were deceiving and the Court, not the FDA, had primary jurisdiction over the action because the case law on misleading containers is well-developed. The Court noted that while it may be difficult for a plaintiff to allege specific facts concerning non-functional slack fill at the pleading stage, one could consult experts or make allegations based on comparable products. The Court went on to conclude, however, that Plaintiff failed to state a claim on any of his causes of action. With respect to the DTPA claim, Judge Seibel held that the safe-harbor allegations were conclusory and so did not satisfy the plausibility standards set forth in *Twombly* and *Iqbal*. Judge Seibel went on to dismiss the fraud claim for failure to plead with specificity, the negligent misrepresentation claim for failure to establish a

special relationship between Plaintiff and Defendant, and the unjust enrichment claim as duplicative of the other claims. Finally, the Court *sua sponte* denied Plaintiff leave to further amend his complaint because there was no indication he possessed facts that would cure the deficiencies in his pleadings.

Judge Román Grants Summary Judgment in Favor of Creditor on Promissory Note

In *Torin Associates, Inc. v. Perez,* No. 15 CIV. 8043 (NSR), 2016 WL 6662271 (S.D.N.Y. Nov. 10, 2016), **Judge Nelson S. Román** granted Plaintiff's motion for summary judgment on a promissory note. Plaintiff loaned $150,000 to Gryphon Biosurgical, LLC, of which Defendants, two individuals, were then-members. Defendants conceded that the loan was made and all parties agreed on its terms. In addition, Defendants executed a broad, personal guarantee, which incorporated the note by reference. After Defendants defaulted on the note and the guarantee, Plaintiff commenced the action in New York State under the CPLR's provision for expedited resolution of debt disputes based on instruments for the payment of money. Defendants removed the action based on diversity jurisdiction and the Court permitted Plaintiff to seek summary judgment immediately. Defendants' sole basis for opposing summary judgment was that the note itself was never executed. Plaintiff conceded the note was never signed, but argued the guarantee and the undisputed terms of the note rendered summary judgment appropriate without discovery. The Court agreed, holding the terms of the guarantee and justified holding them jointly and severally liable on the $150,000 promissory note.

Judge Karas Grants Summary Judgment in Favor of Insurance Company

In *T.N. Metro Holdings, I, LLC v. Commonwealth Ins. Co.*, No. 11-CV-6063 (KMK), 2016 WL 7243554 (S.D.N.Y. Dec. 14, 2016), **Judge Kenneth M. Karas** granted Defendant's motion for summary judgment on the grounds that Plaintiff's lawsuit was untimely. Plaintiff property owners sued their insurance company alleging breach of contract and unjust enrichment with respect to Defendant's alleged failure to pay insurance proceeds related to property damaged in a hailstorm. After Plaintiff initially filed a notice of claim with Defendant in 2007, the parties went back and forth while Defendant investigated the occurrence. When Plaintiff repeatedly failed to provide Defendant with the documents it required to adequately investigate the claim, Defendant closed its file on the matter in 2009. Plaintiff commenced suit two years later. Defendant moved for summary judgment, claiming Plaintiff's suit was untimely based on the one year statute of limitations set forth in the insurance contract. Judge Karas agreed and dismissed the litigation. The Court first noted that

the one-year period was proper under New York law, which permits parties to contract around statutory six-year statute of limitations for breach of contract actions. Here, the insurance contract stated all actions must be filed within twelve months of the time of the occurrence giving rise to the claim. While the parties disputed what constituted an "occurrence" under the terms of the contract, the Court held that the action was untimely under all plausible readings. Judge Karas also rejected Plaintiff's contention that Defendant should be equitably estopped from asserting the one-year statute of limitations because, even if Plaintiff could demonstrate it was improperly induced to refrain from filing a timely action, Plaintiff still failed to bring suit within a reasonable time after the facts allegedly giving rise to the estoppel claim ceased.

Judge Briccetti Grants Summary Judgment to Plaintiff on her Labor Law Claims

In *Zhou v. Aberdeen Dim Sum & Seafood Inc.*, No. 14 CV 2014 (VB), 2016 WL 6238651 (S.D.N.Y. Oct. 24, 2016), **Judge Vincent L. Briccetti** granted partial summary judgment to Plaintiff with respect to her wage claims under the Fair Labor Standards Act ("FLSA") and various New York Labor Laws ("NYLL"). Plaintiff, a former server at Aberdeen Dim Sum and Seafood, sued the restaurant and various individual defendants, alleging her tips were unlawfully credited against state and federal minimum wage requirements. The parties disputed the hours worked and wages Plaintiff received, but agreed that her wages (not including tips) were below the legally permissible minimum wage. Judge Briccetti found that Defendants were not entitled to a tip credit - which allows employers to credit tips against minimum wages - under either the FLSA or the NYLL, because Defendants failed to satisfy the notice and record-keeping requirements of such credits under both statutes. Under the FLSA, Defendants were not entitled to a tip credit because they failed to inform Plaintiff of the regulatory provisions as required by that law. Likewise, under the NYLL, Defendants were not entitled to a tip credit because they failed to furnish Plaintiff with any statements indicating what portion of tips they considered part of her minimum wage; she was not given pay stubs or any tip documentation with her paychecks. Thus, the Court granted summary judgment with respect to liability for federal and state minimum wage violations. Judge Briccetti also granted summary judgment in favor of Plaintiff with respect to her NYLL wage theft claims because Defendants failed to comply with various notice and recordkeeping requirements of that law.

Westchester Supreme Court Justice Ecker Finds Liability Based on Res Ipsa Loquitur

In *Bonacci v. Brewster Serv. Station, Inc.*, No. 50474/2015, 2016 WL 5946706 (N.Y. Sup. Ct. West. Cty. Oct. 5, 2016), **Justice Lawrence H. Ecker**, held the doctrine of

res ipsa loquitur warranted partial summary judgment as to liability in a negligence action. Plaintiffs Tom and Barrie Bonacci sued the Brewster Service Station for personal injuries sustained by Tom when his car fell off of a lift while he and a mechanic were standing below the car in the service station garage bay. Defendant's principal admitted in his deposition that the incident could not have occurred absent negligence, that the car was set up on the lift improperly due to operator error, and that Tom's presence in the bay had nothing to do with the occurrence. Defendant argued that its principal's testimony was speculation rather than an admission because he was not a direct witness to the vehicle falling. The Court agreed with Plaintiffs, and held this case was a rare instance in which summary judgment was appropriate based on a theory of *res ipsa loquitur*. There was no argument or evidence that the lift was defective and there was no dispute that Defendant's conduct was the sole cause of the incident. Thus, Justice Ecker granted summary judgment on liability in Plaintiff's favor.

Special Report:
Yankwitt LLP Wins Motion to Dismiss, Secures Complete Victory for
Out-of-State Client in the Northern District of New York

Yankwitt LLP successfully moved to dismiss all claims against its client, Vermont Railway, Inc., in a personal injury action brought in federal court under the Federal Employers Liability Act. Vermont Railway is a Vermont corporation and the plaintiff was allegedly injured at a Vermont hotel. In its motion, Yankwitt LLP argued the court could not exercise personal jurisdiction over Vermont Railway under the New York long arm statute or as a matter of constitutional due process. On November 3, 2016, the Northern District of New York (Gary L. Sharpe, J.) agreed and granted the motion to dismiss, finding Yankwitt's papers "persuasive" that Vermont Railway is not subject to personal jurisdiction in New York because it is not at "home" in this state and its New York activities are not causally related to the plaintiff's claims, all of which arose out of an incident in Vermont. The case is *Pease v. Vermont Railway, Inc., et al.*, Case 1:16-cv-662.